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No. 79-1221

In the Supreme Court of the United States

OCTOBER TERM, 1979

RONALD GRZWACZ, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

Page

Opinion below 1

Jurisdiction 1

Statutes involved 2

Questions presented 2

Statement 2

Argument 5

Conclusion 14

CITATIONS

Cases:

Iannelli v. *United States*, 420 U.S. 770 6

United States v. *Altese*, 542 F. 2d 104, cert. denied, 429 U.S. 1039 6

United States v. *Benedetto*, 571 F. 2d 1246 ..... 10, 11, 12, 13

United States v. *Brown*, 555 F. 2d 407, cert. denied, 435 U.S. 904 ..... 5, 6, 8

United States v. *Campanale*, 518 F. 2d 352, cert. denied, 423 U.S. 1050 6

United States v. *Cappetto*, 502 F. 2d 1351, cert. denied, 420 U.S. 925 6

United States v. *Faulkner*, 538 F. 2d 724, cert. denied, 429 U.S. 1023 12

United States v. *Field*, 432 F. Supp. 55, aff'd, 578 F. 2d 1371, cert. dismissed, 439 U.S. 801 9

Page

Cases—(Continued):

United States v. *Frumento*, 563 F. 2d 1083, cert. denied, 434 U.S. 1072 ..... 5, 8, 9

United States v. *Grabiec*, 563 F. 2d 313 ..... 12, 13

United States v. *Herman*, 589 F. 2d 1191 11

United States v. *Huber*, 603 F. 2d 387, cert. denied, No. 79-896 (Mar. 17, 1980) 9

United States v. *Iacullo*, 226 F. 2d 788 12

United States v. *Laurelli*, 293 F. 2d 830, cert. denied, 368 U.S. 961 12

United States v. *Mandel*, 415 F. Supp. 997 5

United States v. *Mandel*, 591 F. 2d 1347, rev'd en banc, 602 F. 2d 653 5

United States v. *McLaurin*, 557 F. 2d 1064, cert. denied, 434 U.S. 1020 6

United States v. *Nerone*, 563 F. 2d 836, cert. denied, 435 U.S. 951 9

United States v. *O'Connor*, 580 F. 2d 38 11

United States v. *Parness*, 503 F. 2d 430, cert. denied, 419 U.S. 1105 6

United States v. *Rabbit*, 583 F. 2d 1214, cert. denied, 439 U.S. 1116 13

Page

Cases—(Continued):

United States v. *Sutton*, 605 F. 2d 260, vacated, Nos. 78-5134 through 78-5139, 78-5141-5143 and 78-5074, (Nov. 7, 1979) 5

United States v. *Vignola*, 464 F. Supp. 1091 5

United States v. *Williams*, 577 F. 2d 188 11

Statutes and rules:

Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 *et seq.* 6, 7

Title IX (Racketeer Influenced and Corrupt Organizations (RICO)):

18 U.S.C. 1961(4) 2, 4

18 U.S.C. 1962 6

18 U.S.C. 1962(b) 8

18 U.S.C. 1962(c) 2, 3, 9

18 U.S.C. 1962(d) 2

18 U.S.C. 1963(c) 10

18 U.S.C. 1964 ..... 9, 10

18 U.S.C. 1623 3

Fed. R. Evid. :

Rule 404 2

Rule 404(b) 10, 11

Page

Miscellaneous:

116 Cong. Rec. 32994-32996 (1970) 8

H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. (1970) 8

S. 1722, 96th Cong., 2d Sess. § 1802 (1980) 8

S. Rep. No. 91-617, 91st Cong., 1st Sess. (1969) 7-8, 10

S. Rep. No. 96-553, 96th Cong., 2d Sess. (1980) 8

2 *Weinstein's Evidence* (1979) 10, 12, 13

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 603 F. 2d 682. The opinion of the district court is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1979. A petition for rehearing was denied on December 10, 1979 (Pet. App. A23). On December 26, 1979, Mr. Justice Stevens extended the time in which to file a petition for a writ of certiorari to February 8, 1980 (Pet. App. A24), and the petition was filed on February 7, 1980.

STATUTES INVOLVED

18 U.S.C. 1962 provides in pertinent part:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. 1961 provides in pertinent part:

> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1962(c), which prohibits participation through a pattern of racketeering activity in "any enterprise" that is in or affects interstate commerce, extends to participation in a municipal police department as well as participation in commercial businesses.

2. Whether the admission of evidence of similar misconduct by one of the three petitioners violated Fed. R. Evid. 404.

STATEMENT

1. Following a jury trial in the United States District Court for the Southern District of Illinois, petitioners were convicted of conspiring to conduct an enterprise

through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c), and making a false declaration to a federal grand jury, in violation of 18 U.S.C. 1623. Petitioner Grzywacz was sentenced to 12 years' imprisonment on the racketeering conspiracy count and to a concurrent five-year sentence on the false statement count. Petitioners Goclan and Krieshok each received a seven-year sentence on the racketeering conspiracy count and a concurrent five-year sentence on the false statement count. A divided panel of the court of appeals affirmed (Pet. App. A1-A22).

2. The evidence at trial showed that petitioners used their official positions as members of the Madison, Illinois, police department to solicit and accept bribes and sexual favors from the operators and employees of business establishments in the city of Madison. The bribes were taken in exchange for acquiescence in and protection of illegal activities, which included prostitution and after-hours operation (Pet. App. A4; Tr. 594-599, 773-777, 778-785). The evidence also showed that during approximately the same period that the three petitioners were collecting bribes in the city of Madison, petitioner Grzywacz, in conjunction with members of the Madison County sheriff's office, conducted a similar operation in Madison County, which was beyond the jurisdiction of the Madison City police department (Pet. App. A4-A5).

At the conclusion of the trial, the government tendered instructions stating that the evidence of Grzywacz's Madison County activities could not be considered against Goclan and Krieshok, but that the evidence was admissible against Grzywacz to prove his intent, preparation, design, and manner of operation (Tr. 949-953, 978). Petitioners moved to strike all references in the indictment to the Madison County activities on the ground that they

were not part of the conspiracy. In addition, they sought a mistrial on the ground that the evidence was improperly admitted. The trial court struck the portions of the indictment relating to the Madison County activities, but admitted the evidence concerning them for the purposes advanced by the government (Pet. App. A4-A5). During its charge, the court instructed the jury that the evidence concerning Grzywacz's Madison County activities could be considered only for its bearing on Grzywacz's motive, intent, preparation, plan, knowledge or identity, and that the evidence could not be considered in any way against the other petitioners (*ibid.*).

3. The court of appeals affirmed, with one judge dissenting (Pet. App. A1-A22). The court held, first, that the Madison police department could properly be deemed an "enterprise" as that term is defined in 18 U.S.C. 1961(4). A police department, the court noted, falls within the plain language of the definition, which does not exclude public entities; it concluded that this interpretation of the reach of the Rackeeter Influenced and Corrupt Organizations (RICO) statute is consistent with its legislative history, its purpose, and the case law interpreting its provisions (Pet. App. A5-A9).

The court also held (Pet. App. A9-A11) that the admission of evidence of petitioner Grzywacz's activity with the Madison County sheriff's office was not error, because it was highly probative in revealing a preexisting plan and a similar modus operandi in Grzywacz's shakedown operations. In light of the careful limiting instructions given to the jury, the court of appeals concluded that the district court did not abuse its discretion by admitting this evidence against petitioner Grzywacz.

ARGUMENT

1. Petitioners contend (Pet. 6-13) that the court of appeals erred in holding that the term "enterprise" in the RICO statute encompasses a governmental entity.

Petitioners incorrectly assert that there is a conflict among the circuits on this issue. Only two other circuits have addressed the issue, and both have held, as did the court of appeals in this case, that a governmental entity is an "enterprise" within the meaning of the racketeering statute. See *United States* v. *Frumento*, 563 F. 2d 1083, 1089 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978); *United States* v. *Brown*, 555 F. 2d 407, 415-416 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); see also *United States* v. *Vignola*, 464 F. Supp. 1091, 1095-1097 (E.D. Pa. 1979).[1]

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[1]Petitioners' reliance (Pet. 7-8) upon *United States* v. *Sutton*, 605 F. 2d 260 (6th Cir. 1979), vacated, Nos. 78-5134 through 78-5139, 78-5141-5143 and 78-5074 (Nov. 7, 1979) to support their contention that there is a conflict among the circuits on this issue is misplaced. The question addressed in *Sutton* was whether the RICO statute encompasses enterprises whose purposes are exclusively criminal. Moreover, the Sixth Circuit has granted the government's petition for rehearing en banc in *Sutton* and has vacated the panel's decision. The panel's opinion in *Sutton* is therefore of no precedential value.

Nor does *United States* v. *Mandel*, 415 F. Supp. 997 (D. Md. 1976), support petitioners' claim of an intercircuit conflict. Although the district court in that case held that a state is not an enterprise within the meaning of the racketeering statute, 415 F. Supp. at 1020-1021, on appeal neither the decision of the panel nor that of the en banc court addressed this issue. See *United States* v. *Mandel*, 591 F. 2d 1347 (4th Cir. 1979), rev'd en banc, 602 F. 2d 653 (4th Cir. 1979). Thus, no conflict among the circuit courts resulted from the district court's disposition of that issue.

As the court below noted (Pet. App. A6-A9), these decisions are entirely consistent with both the plain language of the statute and its legislative history. As the court held in *United States* v. *Brown*, *supra*, 555 F. 2d at 415:

> [I]t should be observed that the actual language of the statute [18 U.S.C. 1961(4)] is very broad, encompassing any "legal entity" and any "group of individuals associated in fact although not a legal entity." It must be conceded at the very least that the * * * police department consists of a group of individuals associated in fact and it may well be * * * that the department rises to the level of a legal entity. * * * In short, the language is broad enough to include public as well as private entities.

The language of Section 1962 is similarly broad.[2]

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[2]The sweeping character of this language, which was enacted as part of Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 *et seq.*, was not inadvertent; rather, it evinces a conscious legislative effort to provide a comprehensive scheme to ensnare a wide variety of major criminal activity. See *Iannelli* v. *United States*, 420 U.S. 770, 786 (1975). As this Court noted in *Iannelli* (*id.* at 789), the 1970 Act "is a carefully crafted piece of legislation," and arguments seeking narrowing constructions of the various sections of Title IX have proven unsuccessful. See, *e.g.*, *United States* v. *Parness*, 503 F. 2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975) (contention that term "any enterprise" excludes foreign enterprises); *United States* v. *Campanale*, 518 F. 2d 352, 364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976) (contention that term "any enterprise" excludes small business enterprises); *United States* v. *McLaurin*, 557 F. 2d 1064, 1073 (5th Cir. 1977), cert. denied, 434 U.S. 1020 (1978); *United States* v. *Altese*, 542 F. 2d 104 (2d Cir. 1976), cert. denied, 429 U.S. 1039 (1977); *United States* v. *Cappetto*, 502 F. 2d 1351, 1358 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975) (contention that term "any enterprise" excludes illegal enterprises).

While the legislative history of the RICO statute demonstrates that Congress sought primarily to prevent the infiltration of commercial businesses by organized crime, nothing in the legislative history supports petitioners' contention that Congress did not intend the legislation to protect against abuse of public entities as well. Indeed, petitioners' view is contrary to the broad purpose of the legislation. The congressional Statement of Findings and Purposes of the Organized Crime Control Act of 1970 (Pub. L. No. 91-452, 84 Stat. 922 *et seq.*), of which the RICO statute is a part, provides (84 Stat. 922-923):

> The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud and corruption; * * *
>
> (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes;
>
> (4) organized crime activities in United States * * * threaten the domestic security, and undermine the general welfare of the Nation and its citizens.

Specifically addressing the RICO provisions, Congress emphasized that "[t]here is a rising awarness, in official circles and among all of our people, of the depth of penetration of the forces of organized crime into the fabric of our society and our commercial life." S. Rep.

No. 91-617, 91st Cong., 1st Sess. 76 (1969). See also H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 57 (1970).[3]

Thus, "Congress did not confine its scrutiny to special areas of economic activity." *United States* v. *Frumento*, *supra*, 563 F. 2d at 1091. To the contrary, as the court below noted (Pet. App. A8), "the legislative history manifests a serious concern by Congress not merely with a profusion of racketeering activities within private businesses and labor organizations * * *, but with the potentially devastating effects of organized crime on the nation's political and economic system as a whole." See also *United States* v. *Brown*, *supra*, 555 F. 2d at 416. It thus strongly indicates that Congress intended to protect both the public and private sectors from the effects of racketeering (Pet. App. A8).[4]

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[3]Senator McClellan, author of the Organized Crime Control Act of 1970 and its chief spokesman in the Senate, demonstrated his concern about the corruption of local governments by elements of organized crime by publishing an article on the subject in the Congressional Record during the debates over the RICO statute. The article highlighted incidents of bribery and extortion by officials of local governments, the infiltration of organized crime elements in a city government, and the control of a gambling organization by a municipal police department. 116 Cong. Rec. 32994-32996 (1970).

[4]This interpretation of the legislative history is reinforced by recent congressional action. The framers of the Criminal Code Reform Act of 1979, S. 1722, 96th Cong. 2d Sess. (1980), expressly readopted Sections 1962(b) and (c) of the RICO statute in their draft legislation. See S. 1722, 96th Cong. 2d Sess. § 1802 (1980). Commenting upon the breadth to be accorded the term "enterprise" in the reenactment, the Senate Judiciary Committee noted (S. Rep. No. 96-553, 96th Cong., 2d Sess. 803 n.32 (1980)):

> [The term] has also been interpreted to include a unit of domestic government in light of the explicit congressional findings that organized crime uses its money and power to subvert and corrupt our domestic processes." * * * *United States* v. *Brown*, 555 F. 2d 407 (5th Cir. 1977) (holding a municipal police department to be an "enterprise"). * * * The Committee intends that the same broad interpretations be given to the term "enterprise" in this bill.

Finally, the fact that Section 1962(c) prohibits the conduct of an enterprise "through a pattern of racketeering activity" lends no support to petitioners' claim. Section 1962(c) nowhere requires proof that the defendants' activities advanced the enterprise's affairs. It requires only that the government establish that the defendants' acts were committed in the conduct of the enterprise's affairs. *United States* v. *Field*, 432 F. Supp. 55, 58 (S.D. N.Y. 1977), aff'd, 578 F. 2d 1371 (2d Cir. 1978), cert. dismissed, 439 U.S. 801 (1978). See *United States* v. *Huber*, 603 F. 2d 387, 395 (2d Cir. 1979), cert. denied, No. 79-896 (Mar. 17, 1980); *United States* v. *Nerone*, 563 F. 2d 836, 851 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978). The government met this evidentiary requirement by showing that petitioners used the authority of the Madison City police department in carrying out their pattern of soliciting and accepting bribes.[5]

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[5]The petitioners' reliance (Pet. 10-11) upon the ejusdem generis doctrine to support their narrow definition of the term "enterprise" is misplaced. As the court explained in *United States* v. *Frumento*, *supra*, 563 F. 2d at 1090: "The rule should not be employed when the intention of the legislature is otherwise evident. * * * Nor should it be applied to defeat the obvious purpose of the statute or to narrow the targets of Congressional concern * * * [In view of the legislative history] it is apparent that Congress intended the general words defining an 'enterprise' in 1961(4) to go beyond the specific references to private business or labor organizations."

Moreover, the fact that Section 1964 of the RICO statute authorizes the judge to impose a number of civil remedies, including dissolution of any enterprise for violation of the statute, does not

In sum, the reasons that led this Court to decline to review this issue in *Brown* or *Frumento* are equally applicable to the instant case.

2. Petitioners also claim (Pet. 13-20) that the district court erred in admitting the evidence of Grzywacz's Madison County activities. This issue turns on the particular facts of this case and thus does not merit this Court's review. In any event, the evidence was properly admitted.

Fed. R. Evid. 404(b) codifies the settled principle that "[e]vidence of similar criminal acts is admissible if it is substantially relevant for some other purpose than to show the probability that [the] defendant committed the crime on trial because he is a man of criminal character," and the probative value of the evidence outweighs its prejudicial tendencies. *United States* v. *Benedetto*, 571 F. 2d 1246, 1248 (2d Cir. 1978); see 2 *Weinstein's Evidence* para. 404[08] at 404-41 to 404-42 (1979). As the court of appeals properly concluded, the evidence of Grzywacz's Madison County activities was highly relevant for several reasons.

First, the evidence tended to establish petitioner Grzywacz's intent in soliciting money from establishments in the city. Petitioners' intent was a contested issue: the

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show that Congress intended only commercial enterprises to be encompassed by the statute. The section simply confers jurisdiction upon district courts to impose antitrust-type remedies to protect the public from persons who conduct organizations affecting commerce through a pattern of criminal activity. See S. Rep. No. 91-617, *supra*, at 81-82. Unlike the criminal forfeiture section (18 U.S.C. 1963(c)), Section 1964 does not mandate imposition of any particular measure to redress a violation. Instead, it grants the district court the latitude to fashion whatever type of relief is most appropriate (including loss of right to hold office) to accomplish the statute's broad remedial objectives. *Ibid.*

thrust of the cross-examination of a government witness, a tavern owner, was that the payments involved were solicited from the tavern operator to aid in the establishment of a fund to combat a municipal ordinance establishing new closing hours for taverns (Tr. 776-777). Thus, the evidence showing receipt of bribes from county businesses, unaffected by the municipal ordinance, was properly admitted to demonstrate Grzywacz's intent in receiving the payments, and particularly to rebut the implication of this cross-examination that they were solicited for an innocent reason. See *United States* v. *Williams*, 577 F. 2d 188, 191 (2d Cir. 1978).[6]

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[6]The situation was different in *United States* v. *O'Conner*, 580 F. 2d 38, 40 (2d Cir. 1978), upon which petitioners rely. There, intent was not in issue, because the defense was a flat denial that the defendant had ever taken any money from the witnesses who said they had paid him (*ibid.*). See *United States* v. *Benedetto*, *supra*, 571 F. 2d at 1249. Indeed, before the evidence was admitted, O'Connor specifically disclaimed any wish to controvert the question of intent (580 F. 2d at 42). In addition, the uncharged acts of bribery in *O'Connor* were not substantially contemporaneous with the offenses charged in the indictment (*ibid.*), as they were here. Finally, the evidence was particularly prejudicial because the defense relied heavily on evidence of good character (*id.* at 43)—a defense that petitioner Grzywacz did not make.

Nor does *United States* v. *Herman*, 589 F. 2d 1191 (3d Cir. 1978), conflict with the decision of the court below, as petitioners claim (Pet. 17). The trial judge in that case excluded evidence of uncharged acts of bribery when proffered by the government under Fed. R. Evid. 404(b), but later admitted that evidence to rebut defense character testimony. On appeal, the court held that this was error. The court rejected the government's alternative argument that the district court, in the exercise of its discretion, should have admitted the evidence under Rule 404(b), because "the evidence was admitted under a different theory." 589 F. 2d at 1198. The court also held that the evidence was unduly prejudicial because, as in *United States* v. *O'Connor*, *supra*, it directly controverted the defendant's character defense (*id.* at 1198).

In addition, the evidence was admissible to demonstrate that the charged offenses were committed pursuant to a larger continuing plan or scheme. See 2 *Weinstein's Evidence*, *supra*, para. 404[09] at 404-59 to 404-60 & nn. 37, 38. *United States* v. *Iacullo*, 226 F. 2d 788, 793 (7th Cir. 1955). Using this rationale, courts reviewing convictions for bribery or extortion have repeatedly sanctioned the introduction of evidence of essentially contemporaneous uncharged offenses to show the perimeters of the scheme and the extent of the participants' involvement. See *United States* v. *Benedetto*, *supra*, 571 F. 2d at 1249; *United States* v. *Grabiec*, 563 F. 2d 313, 318 (7th Cir. 1977); *United States* v. *Faulkner*, 538 F. 2d 724, 728 (6th Cir.), cert. denied, 429 U.S. 1023 (1976); *United States* v. *Laurelli*, 293 F. 2d 830, 832 (3d Cir. 1961), cert. denied, 368 U.S. 961 (1962). Here, as the court below noted (Pet. App. A9), the Madison County evidence was highly probative of these matters because it showed that at approximately the same time that all three petitioners were using their official positions to obtain payoffs within the city of Madison, Grzywacz was also utilizing his status and authority as a law enforcement officer to engage in a practice of collecting bribes from businesses in the county.[7]

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[7]Petitioners incorrectly contend (Pet. 15) that the activity in Madison County occurred more than a year before the Madison City offenses. The evidence shows that Grzywacz began soliciting bribes from Madison City tavern owners shortly after a municipal closing ordinance was enacted in October 1970 (Tr. 595-597, 775-776) and that the payments continued through 1974 (Tr. 496). The evidence also shows that in September 1970 Grzywacz began taking bribes from the proprietor of a Madison County house of prostitution, and the payments continued through January 1973 (Tr. 118-125).

Finally, the evidence was admissible because the close similarity in modus operandi tended to prove that Grzywacz committed the charged offenses. In both the city and the county, the businesses targeted for shakedowns were very similar, as was the pattern of Grzywacz's formation of an alliance with other officers to effectuate the shakedown scheme. See *United States* v. *Rabbit*, 583 F. 2d 1214, 1228 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979); *United States* v. *Grabiec*, *supra*, 563 F. 2d at 318; 2 *Weinstein's Evidence*, *supra*, para. 404[09] at 404-61 to 404-62.

In view of the substantial probative value of the Madison County evidence, the trial judge did not abuse his broad discretion in determining that its value with respect to Grzywacz's culpability outweighed its prejudicial effect. See, *e.g.*, *United States* v. *Benedetto*, *supra*, 571 F. 2d at 1251. There is no merit to the claim of petitioners Goclan and Krieshok (Pet. 16) that they were prejudiced by the Madison County evidence. None of that evidence implicated those petitioners in any of Grzywach's Madison County activities; in any event, the judge's instruction made it clear that the evidence could only be considered against Grzywacz.[8]

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[8]The instruction is set out in the decision of the court below (Pet. App. A11).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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